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Supreme Court of the United States

October Term, 1962

No. 350

NATIONAL LABOR RELATIONS BOARD,

Respondent,

v.

LUNDY MANUFACTURING CORP.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The above named petitioner prays that a writ of certiorari issue to review a decision and decree of the United States Court of Appeals for the Second Circuit. The decision of the Court of Appeals, 316 F 2d 921, was handed down on April 26, 1963; the decree followed on May 15, 1963. The decree enforced an order of the National Labor Relations Board dated April 20, 1962, reported at 136 NLRB No. 128.

The opinion of the Court of Appeals and the decision of the National Labor Relations Board are printed as an appendix to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

This application presents an important question under the National Labor Relations Act which has not been but should be settled by this Court. Further, we respectfully suggest that the decision of the Court of Appeals is inconsistent with the proper interpretation and application of §9(a) and §10(b) of the Act and with principles established in this Court's prior decisions.

The questions presented are:

(1) Whether an employer, party to a valid agreement containing a grievance procedure with the collective bargaining representative of its employees, is under a duty to recognize a non-bargaining-representative grievance committee in the absence of any pending grievance.

(2) Whether the Court of Appeals may enforce an order of the NLRB upon grounds not given by the Board in its decision. *Cf. Securities & Exch. Comm.* v. *Chenery Corp.*, 332 U. S. 194, *Burlington Truck Lines* v. *U. S.*, —— U. S. ——, 9 L. Ed. 2d 207.

(3) Whether the Board, having found that unfair labor practices occurred within the limitations period of §10(b) of the National Labor Relations Act, may make its order more onerous because of alleged unfair labor practices antedating the limitations period. *Cf. Local Lodge* v. *NLRB*, 362 U. S. 411.

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. §§151 *et seq.* are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *

"Sec. 8(a). It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

"Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment

is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"Sec. 10(b). * * * *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * *"

Statement

The order of the Board, 136 NLRB No. 128, enforced by the Court of Appeals, consolidates for decision a case against Lundy relating to events in 1957-1958, which had previously been remanded by the Court of Appeals, 286 F. 2d 424, with another case against Lundy relating to events in 1960.

The 1957-1958 Case

On May 28, 1957, Lundy signed a two-year contract with Amalgamated Local Union 355 as collective bargaining representative of Lundy's production and maintenance employees, containing a union security clause, subject to reopening as to wages at the end of one year on 60 days notice.

On this application, Lundy assumes that there was evidence to support a finding that Local 355 either did not represent a majority of Lundy's employees when the contract was executed or, if it did, that the majority was obtained by Lundy's assistance.

In March, 1958, Local 355 requested reopening as to wages and other matters. Negotiations ensued, culminating in agreement on a three-year extension of the contract from July 1, 1958, with annual wage increases and other benefits. At a union meeting on May 12, 1958, the agreement was approved by the membership.

Thereafter, a series of contract drafts passed back and forth. At a Union meeting held on July 15, 1958, where the final draft was read, disaffection appeared. Some members questioned whether the contract had previously been ratified; others taxed them with reneging on their agreement. A movement began for disaffiliation from Local 355 and affiliation with International Union of Electrical, Radio and Machine Workers (herein called IUE).

Meanwhile, employees had complained of the delay in paying the wage increases effective July 1, 1958. On July 22, 1958, Lundy posted a notice that it would pay the increase immediately. Later that day, some employees surreptitiously posted notices in the plant announcing a meeting that night to vote on disaffiliating with Local 355 and joining IUE.

On July 23, 1958, IUE wired Lundy that its employees had voted to disaffiliate from Local 355 and asked Lundy to recognize IUE as bargaining agent. IUE also distributed a leaflet at the plant which reviled the new agreement with Local 355 as a "sweetheart deal".

Two employees were discharged on July 22, and one on July 24, 1958, allegedly because they favored affiliation with IUE. The revised contract with Local 355 was ratified on July 30, and signed on July 31, effective as of July 1, 1958.

Unfair labor practice charges were filed with the Labor Board on July 30, 1958, and served on Lundy on August 1, 1958.

The Board in a decision rendered in December, 1959, 125 NLRB No. 109, adopted a finding by its Examiner:

> "Section 10(b) of the Act does not preclude a consideration of events antedating the charges by more than 6 months and Respondent's conduct, within the 6-month period, of continuing and maintaining the aforedescribed 1957 contract and of executing and maintaining the 1958 contract, constitute violations of Section 8(a) (1), (2) and (3) of the Act."

The Board also adopted findings of the Examiner, that, in view of the appearance of IUE on the scene in July, 1958, Lundy could not lawfully recognize or contract with Local 355 until the latter's right to be recognized had been determined by a Board-supervised election, and that the discharges were likewise unlawful. Accordingly, the Board directed Lundy to cease and desist from encouraging membership in Local 355 or discouraging membership in IUE and from giving effect to the 1958 contract with Local 355; to offer the three discharged employees reinstatement with back pay; and to reimburse its employees for dues and initiation fees to Local 355 deducted from their earnings.

On petition for enforcement, the Court of Appeals, 286 F 2d 424, remanded the proceeding "for further consideration by the Board in the light of the Local Lodge No. 1424, IAM v. NLRB, 362 U. S. 411." Among other things, the court held that "The Board also might treat the alleged discriminatory discharges differently in a setting wherein the 1957 agreement with Local 355 was entitled to the benefits of the contract bar rule."

The 1960 Case

Lundy continued to give effect to the contract of July 31, 1958 while the proceeding to enforce the Board's order, 125 NLRB No. 109, was pending in the Court of Appeals.

The contract of July 31, 1958 had a three-year term, effective until June 30, 1961. It provided that "any dispute * * * between the Employer and the Union or concerning the interpretation or application of any provision of this agreement * * * shall first be taken up between a representative of the Union, one or more of the Union Shop Stewards and a representative of the Employer" and, if not adjusted, should be submitted to arbitration.

In accordance with the contract, Local 355 had maintained a grievance committee in the shop. On April 11, 1960, an employee was discharged in an altercation over a grievance and several members of the Local 355 grievance committee resigned.

On April 12, 1960, several employees protested the discharge to Lundy's president, Barbato. He reduced the discharge to a one-day suspension and suggested that the employees elect a grievance committee in view of the resignation of the old one. At noon, a number of employees from the day shift attended a meeting held at a hall rented by the IUE. With the IUE representative present, they selected a 7-man committee. That afternoon, this committee demanded "recognition." Barbato refused to recognize it because it was an IUE group and suggested that another election be held at the end of the day shift so that the night shift employees could also attend.

There was no pending grievance. The committee requested recognition "in general."

On April 18, the group supporting the 7-man committee—again with only the day shift present—voted to strike if it was not recognized.

On the morning of April 19, the committee again demanded recognition which Lundy refused.

Meanwhile, on April 14, Lundy had posted notices announcing a meeting on the afternoon of April 19 for employees to elect a grievance committee. The president of Local 355 came to the plant on April 19, tore down these notices, and advised Lundy that Local 355 had a grievance committee and would not recognize any other.

On April 20, about half of the employees struck, picketing with signs reading "IUE, AFL-CIO." IUE representatives directed the strike and paid the pickets, while Local 355 representatives urged employees to cross the picket-line because it was an IUE strike.

On April 21, Local 355 held a meeting at which it elected a new grievance committee.

On May 3, the strike ended with the reinstatement of all strikers except six who had been replaced and one who was discharged during the strike.

The original charge was filed and served on April 18, 1960.

The Trial Examiner's report dated December 9, 1960 (while the 1957-1958 case was still pending before the Court of Appeals) found:

> "* * * under the Board's decision and order of December 29, there was no recognized bargaining representative of the employees, nor was any valid collective bargaining agreement covering the processing of

grievances in effect at the time. Therefore, the Company was under statutory obligation to at least accept and meet with and discuss grievances with the committee."

The Trial Examiner found that Lundy's failure to recognize this committee in April 1960, even though there was no pending grievance, transformed the strike into an unfair labor practice strike.

Thereafter, on December 26, 1960, the Court of Appeals remanded the 1957-1958 case.

The Board's Order

On April 20, 1962, the Board handed down its "Supplemental Decision and Amended Order", 136 NRLB No. 128. This consolidates without previous notice the 1957-1958 case remanded by the Court of Appeals with the 1960 case, then still awaiting original decision.

As to the 1957-1958 case, the Board held:

"* * * we now make no finding that the Respondent violated the Act in 1957, either by maintaining or by giving effect to its 1957 contract with Local 355. Such a finding would be inescapably grounded on events predating the limitations period. Nor do we find that the Respondent was faced with a valid representation claim by reason of the IUE representation petition filed in July, 1958, some 10 months before expiration of the 1957 contract's 2-year term. Under such circumstances no litigable question concerning representation came into existence at that time. We likewise do not find a violation of Section 8(a)(2) or (1) based on the Respondent's conduct in executing or maintaining in effect its 1958 contract with Local 355 after

the IUE filed its petition. In all other respects, however, we reaffirm the Section 8(a)(1), (2) and (3) violations found in our original Decision and Order of December, 1959."

With respect to the 1960 case, the Board said:

"As for the Section 8(a)(1) and (3) violations alleged in the remaining cases, we agree with Trial Examiner Hilton's findings in support of these allegations."

However, the Trial Examiner's findings had been based upon the Board's 1959 decision, that there was no recognized bargaining representative nor any valid collective bargaining agreement covering the processing of grievances in effect at the time. The Board, in registering agreement with the Trial Examiner, apparently overlooked that it had declared the 1958 contract valid; that, therefore, there was a recognized bargaining representative and a valid collective bargaining agreement covering the processing of grievances in effect at the time.

The Decision Below

The Court of Appeals noted (316 F. 2d at pp. 924-925):

"Lundy says if could not have violated §8(a)(1) by refusing to recognize an elected grievance committee which it considered to be under IUE influence, when a subsisting and valid collective bargaining agreement required it to handle grievances through Local 355. In the light of the Board's own decisions in related contexts, denial of this claim warranted much more explanation than a one-sentence approval

of an examiner's conclusion heavily resting on a premise the Board had destroyed."

The Court of Appeals, nevertheless, affirmed this aspect of the Board's order but supplied its own reason for such conclusion.

The court also upheld the Board's order directing Lundy to withhold recognition from Local 355—the collective bargaining representatives of Lundy's employees—unless and until that Union be certified. The Board had specifically held so broad an order to be proper here because of "the background (prelimitations) evidence, showing that the Respondent coerced its employees into designating Local 355 as their collective bargaining representative, and that Local 355 never was their free choice."

The Court of Appeals upheld such use of prelimitations evidence by the Board as a basis for making its order more onerous.

I

Whether the Court of Appeals may enforce an order of the NLRB upon grounds not given by the Board in its decision

The crux of the 1960 case was the Board's finding that Lundy's refusal in April, 1960, to recognize the 7-man grievance committee (elected by the day shift outside the framework of the contract with Local 355) was a violation of the rights guaranteed to employees by §7 of the Act. Therefore, the Board held that the strike which followed was an unfair labor practice strike and the discharges and refusals to reinstate violated §8(a)(3) and (1) of the Act.

The trial examiner found that Lundy was under a duty to recognize the 7-man grievance committee. The Court of Appeals observed that his finding was based upon

> "his conclusion—unwarranted, as matters turned out—that 'under the Board's Decision and Order of December 29 (1959), there was no recognized bargaining representative of the employees, nor was any valid collective bargaining agreement covering the processing of grievances in effect at the time'. * * * The Board's opinion merely registered agreement with the examiner's findings in regard to the Section 8(a)(1) and (3) violations—although, in view of its own action with respect to the 1958 case, it could not reasonably have agreed with the passage just quoted". (316 F. 2d at p. 924).

Lundy argued that it could not have violated §8(a)(1) by refusing to recognize the 7-man grievance committee when a subsisting and valid collective bargaining agreement required it to handle grievances through Local 355. The Court of Appeals agreed that "denial of this claim warranted much more explanation than a one-sentence approval of an examiner's conclusion heavily resting on a premise the Board had destroyed" (316 F. 2d at p. 925). The Court held that "we think the Board's order here should be enforced, although we wish the Board had explained its position more thoroughly (316 F. 2d at p. 926). The Court held that Local 355 actually had no grievance committee for the ten days between April 11, when the Local 355 grievance committee resigned, and April 21, when the Local 355 committee was reconstituted, and that

> "In this vacuum the employees were not required to rest their §7 rights on the hope that when a griev-

ance arose, the individual employee affected would somehow manage to obtain a hearing, * * *".

Whatever may be said for this *ratio decidendi*, it was not the one given by either the Trial Examiner or the Labor Board. It was formulated by the Court because of "the unsatisfactory and cryptic nature of the Board's Decision" (316 F. 2d at p. 927, n. 3).

Plainly, the Court of Appeals has enforced the order of the NLRB upon grounds not given in the Board's decision. Such action was inconsistent with principles established in this Court's prior decisions. See *Securities & Exch. Com.* v. *Chenery Corp.*, 332 U. S. 194, *Burlington Truck Lines* v. *U. S.*, —— U. S. ——, 9 L. Ed. 2d 207.

II

Whether Lundy, party to a valid agreement containing a grievance procedure with the bargaining representative of its employees, was under a duty to recognize a non-bargaining-representative grievance committee in the absence of any pending grievance

In view of the existence of the 1958 contract with Local 355, in effect in April and May, 1960, Lundy was not under any duty to "recognize" the 7-man committee. Lundy's duty was to "recognize" only Local 355, the collective bargaining representative of its employees.

The fact that the Local 355 grievance committee resigned on April 11, 1960 and was not reconstituted until April 21, 1960, ten days later, did not create an obligation to "recognize" a non-Local 355 committee in the absence of a grievance.

In sum, Lundy's refusal to recognize the 7-man committee was justified. Therefore, the strike was a wildcat strike, not an unfair labor practice strike.

Under §9(a) of the Act, "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives* of all the employees * * *" (italics ours). The fact that a union committee resigned and was not reconstituted for 10 days created no exception to the exclusive representation principle.

The decision below on this question fractures the exclusive representation principle of §9(a) of the Act. It required the employer here to "recognize" two different representatives for the handling of future grievances, (1) Local 355, the collective bargaining representative, and (2) the 7-man committee.

There was no pending grievance. The 7-man committee was not an *ad hoc* committee chosen by an individual employee to present his grievance, as permitted under the proviso to §9(a).

The question is important in the administration of the National Labor Relations Act. It has never been settled by this Court.

The Court below observed (316 F. 2d at p. 926) "The court decision we find most nearly in point, is National Labor Relations Board v. Kearney & Trecker Corp., 237 F. 2d 416 (7 Cir. 1956), not cited by either party." After discussing that decision at some length, the Court below observed (316 F. 2d at p. 926), "The situation here was significantly different from that in Kearney & Trecker."

It seems plain, therefore, that there is no decision in point on the subject. We respectfully submit that the question warrants the consideration of this Court.

III

Whether the Board, having found that unfair labor practices occurred within the limitations period of §10(b) of the Act, may make its order more onerous because of alleged unfair labor practices antedating the limitations period

The Board ordered Lundy to withhold recognition from Local 355—the bargaining representative of Lundy's employees under a valid contract—unless and until that union is certified by the Board.

The Board said, "* * * we have rejected the contention that in every case involving assistance in violation of Section 8(a)(2), we should mechanistically order the employer to cease recognizing the assisted union."

Nevertheless, the Board held that "so broad an order was proper here because of the 'background (prelimitations) evidence, showing that the Respondent coerced its employees into designating Local 355 as their collective bargaining representative, and that Local 355 never was their free choice'" (316 F. 2d at p. 927).

Such an order, we submit, is inconsistent with the proper interpretation of Section 10(b) of the Act and with the application of the principles established by this Court in *Local Lodge* v. *NLRB*, 362 U. S. 411.

The court below, in enforcing the Board's order, found support for the Board's action in this Court's holding that "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices * * * earlier events may be utilized to shed light on the true character of matter oc-

curring within the limitations period." *Local Lodge* v. *NLRB*, 362 U. S. 411, 416.

With all respect, we submit the quotation is not apropos. This Court was there speaking of the "evidentiary use of anterior events", 362 U. S. at p. 416, not their use to frame an order.

The use of prelimitations events as a basis for a cease-recognition order is substantive, not evidentiary; it penalizes the prelimitations conduct.

By using prelimitations conduct to determine choice of remedy, the Board had penalized the employer for, and has remedied, such conduct. A complaint based on such conduct—proscribed by Section 10(b) of the Act—could do no more.

The Board is doing indirectly what it cannot do directly. In effect, it is punishing Lundy as a second offender in the absence of any prior conviction for a first offense.

Such use of prelimitations conduct violated §10(b) of the Act and the principles established in *Local Lodge*, *supra*.

Conclusion

The writ of certiorari should be issued, the decree below reversed and the matter remanded to the Board.

August, 1963

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Opinion of the Court

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Argued March 27, 1963

Decided April 26, 1963

No. 27730

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LUNDY MANUFACTURING CORPORATION,

Respondent.

Hans J. Lehmann, Washington, D. C. (Stuart Rothman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, N. L. R. B.), for petitioner.

Harold Dublirer, New York City (Dublirer & Haydon, New York City), for respondent.

Before

CLARK, WATERMAN and FRIENDLY, Circuit Judges.

FRIENDLY, Circuit Judge.

The National Relations Board asks us to enforce an order, 136 NLRB No. 128, made in a proceeding in which it consolidated a case against respondent employer relating to events in 1957 and 1958, which we had remanded, 286 F. 2d 424 (2 Cir., 1960), with another case against the same respondent relating to events in 1960, which had then reached the stage of an intermediate report by an examiner. Our remand had directed the Board to give further consideration to its ruling in the earlier proceeding, 125 NLRB 1188 (1959), in the light of the intervening decision in Local Lodge No. 1424, I. A. M. v. N. L. R. B., 362 U. S. 411, 80 S. Ct. 822, 4 L. Ed. 2d 832 (1960), which held that the six-month statute of limitations contained in §10(b) of the National Labor Relations Act barred an unfair labor practice complaint based on a collective bargaining agreement executed more than six months before the complaint was brought. In response the Board revoked its findings in the remanded case that respondent had violated the Act by maintaining or giving effect to its 1957 contract with Amalgamated Local Union 355, and by executing and maintaining in effect, without terminating the 1957 agreement, the revised contract of July, 1958. However, the Board adhered to its findings that three employees had been discriminatorily discharged in 1958, in violation of §8(a)(3) and (1), for supporting a rival union, the International Union of Electrical Workers, hereafter the IUE, and that these discharges and other action by respondent in that year constituted unlawful assistance to Local 355 in violation of §8(a)(2). In the 1960 case the Board upheld the examiner's finding that Lundy had violated §8(a)(1), (2) and (3)

through conduct stemming from its refusal to deal in April, 1960, with an employees' grievance committee which it regarded as unduly influenced by the IUE; this led to what the examiner found to be an unfair labor practice strike and the consequent unlawful refusal to reinstate six strikers and discriminatory discharge of another. In addition to the usual cease and desist provisions and reinstatement requirements (both as to the employees discharged in 1958 and those discharged or not reinstated in 1960), the Board directed that Lundy refrain from recognizing Local 355 for any purpose unless and until that union shall have been certified by the Board as the exclusive representative of the employees.

With respect to the findings in the 1958 case, respondent contends that the Board did not adequately respect our statement, 286 F. 2d at 426, that:

> "The Board also might treat the alleged discriminatory discharges differently in a setting wherein the 1957 agreement with Local 355 was entitled to the benefits of the contract bar rule."

In argument respondent characterized this remark as a "mandate", but the language shows this was exactly what it was not; even in a judicial opinion, "might" does not mean "must." The Board was well within its powers in deciding that the legality of Lundy's contract with Local 355 did not justify discriminatory tactics against employees "in disfavor with the union because of activities protected by §7." National Labor Relations Board v. Local 138, Int'l Union of Operating Engineers, 293 F. 2d 187, 197

(2 Cir., 1961). Although there can be debate as to the reason for the discharges, especially Healy's, we may not enter into this area when, as here, the Board's findings are supported by substantial evidence on the record as a whole.

A good deal more needs to be said about the 1960 case. The facts as to the episode that sparked the trouble were reasonably found to have been as follows:

The contract of July 31, 1958, between Lundy and Local 355, effective until June 30, 1961, provided that "any dispute * * * between the Employer and the Union or concerning the interpretation or application of any provision of this agreement * * * shall first be taken up between a representative of the Union, one or more of the Union Shop Stewards and a representative of the Employer" and, if not adjusted, should be submitted to arbitration. Apparently pursuant to this provision, Local 355 had maintained a "grievance committee" in the shop, but the committee ceased to function in early April, 1960, when several shop stewards resigned from it. Shortly thereafter, on April 11, one employee complained about working conditions and a second, who intervened upon hearing that the complainer had been threatened with discharge if he went home, was himself fired for his pains. On the next morning, April 12, seven other employees protested by remaining in the company's parking lot to await the arrival of the president, Barbato. The latter proposed that the employees select a committee to discuss the discharge and resume work in the meantime; upon meeting with the committee that morning, he reduced the discharge to a 1-day suspension and suggested that the employees elect a standing committee to

handle future grievances. During the noon workbreak practically all the dayshift employees attended a meeting held at a hall rented by the IUE. They elected a committee of seven, two of whom were active members of IUE and one of Local 355; the IUE business representative attended the meeting but did not participate, except to state after the business was completed that he was sorry the employees were not seeking his leadership. That afternoon, when presented with the new committee, Barbato refused to recognize it because the members "were too much inclined to be in favor of the IUE"; he proposed that a meeting be held to "vote on a different committee, one that he would see fit to recognize," and that the meeting be held in the plant at the end of the day-shift so that the night-shift employees could also attend, which he would allow them to do on company time. The committee declined this offer, but held a meeting on the afternoon of April 18 at the outside hall, the rental being paid on this occasion by one of the committee members. Both shifts were invited but only workers on the day-shift attended, some 95 of the 120 employees being present; they unanimously backed the committee already chosen and voted to strike if it was not recognized. On the morning of April 19, Barbato again refused to recognize the committee; in the afternoon the employees again voted to strike. Meanwhile, on April 14, the company had posted notices announcing a meeting on the afternoon of April 19 for the employees to elect a grievance committee. This led to a visit to the plant on April 19 by the president of Local 355; he tore down the notices and advised some of the employees and the company that Local 355 already had

a committee and would not recognize any other. The strike started on April 20; it was only partially effective and ended on May 3—with, as the examiner was warranted in finding, one employee who reported for work during the strike discharged because of strike activities and IUE affiliations, and six strikers denied reinstatement. Meanwhile, Local 355 had called a meeting on April 21 attended by some 70 employees, at which another grievance committee was elected.

The examiner found that Lundy's acts violated §8(a)(1) by denying the employees rights guaranteed by §7, that the strike was thus an unfair labor practice strike, and that the discharge and refusals to reinstate thus violated §8(a)(3) and (1). However, he did not fully spell out the reasoning underlying the first of these findings, which seems to have been influenced in substantial part by his conclusion—unwarranted, as matters turned out—that "under the Board's Decision and Order of December 29 [1959], there was no recognized bargaining representative of the employees, nor was any valid collective bargaining agreement covering the processing of grievances in effect at the time." He found the allegation that the discharge and refusals to reinstate had also violated §8(a)(2) "redundant" in view of the same Order. The Board's opinion merely registered agreement with the examiner's findings in regard to the Section 8(a)(1) and (3) violations—although, in view of its own action with respect to the 1958 case, it could not reasonably have agreed with the passage just quoted. In addition it found "that the Respondent thereby gave continued substantial assistance and support to Local 355 in violation of Section 8(a)(2)

of the Act, as also alleged"—without specifying what it meant by "thereby."

Lundy says it could not have violated §8(a) (1) by refusing to recognize an elected grievance committee, which it considered to be under IUE influence, when a subsisting and valid collective bargaining agreement required it to handle grievances through Local 355. In the light of the Board's own decisions in related contexts, denial of this claim warranted much more explanation than a one-sentence approval of an examiner's conclusion heavily resting on a premise the Board had destroyed.

There can be no doubt that, as indeed was squarely held in National Labor Relations Board v. Washington Aluminum Co., 370 U. S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962), the right of employees to join in protest over working conditions is one of the "concerted activities for * * * mutual aid or protection" guaranteed by §7; moreover, §7 recognizes the right of employees "to form, join, or assist labor organizations," and such organizations are defined by §2(5) as including "any * * * employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances * * *." But the rights recognized in §7 may be affected by a valid collective bargaining agreement; to deny this would be to ignore not only the exclusive-representation principle of §9(a) but the whole policy of Congress, set forth in §1, of "encouraging the practice and procedure of collective bargaining" and relying on such agreements for the maintenance of industrial peace—as the Board's contract bar rule, see Local 1545, United Bhd. of Carpenters v.

Vincent, 286 F. 2d 127 (2 Cir., 1960); National Labor Relations Board v. Marcus Trucking Co., 286 F. 2d 583 (2 Cir., 1961), clearly recognizes. Since the employees in Washington Aluminum were unorganized, that case, heavily relied on by counsel for the Board, in no way holds that, despite the existence of a valid collective bargaining agreement containing a grievance procedure, an employer has a duty, or even a right, to recognize any other *representational* machinery for the handling of future grievances. It is true that valid recognition of a union and establishment of a contractual grievance procedure do not impair the right, expressly recognized in the proviso to §9(a), of "any individual employee or a group of employees * * * at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect."[1] Moreover, it was held under this proviso, in its pre-Taft-Hartley form, that "an inexperienced or ignorant griever can ask a more experienced friend to assist him * * *." Hughes Tool Co. v. N. L. R. B., 147 F. 2d 69, 73 (5 Cir., 1945); see also National Labor Relations Board v. North American Aviation, Inc., 136 F. 2d 898 (9 Cir., 1943). However, the Hughes Tool opinion went on to hold that, because "It was not thought good to allow grievance hearings to become clashes between rival unions," the employee cannot present his grievance through any union except the representative."

1. This is subject to the further proviso "That the bargaining representative has been given opportunity to be present at such adjustment."

The sole decision pointing to a contrary conclusion, strongly pressed on us by counsel for the Board, is Judge Learned Hand's opinion in Douds v. Local 1250, Retail & Wholesale Department Stores Union, 173 F. 2d 764, 770 (2 Cir., 1949), which held that it would not have been an unfair labor practice, under the circumstances there presented, for the employer to allow a defeated union to assist strikers seeking reinstatement, which the court considered a "grievance" under the 9(a) proviso. But that holding, assuming its correctness, does not necessarily mean that it *would be* an unfair labor practice for the employer to *refuse* to deal with anyone other than the aggrieved employees on the one hand or their contractually authorized representative on the other; moreover, the opinion must be read in the light of its factual statement that not only was there no contractual grievance procedure established in the shop, but "So far as appears, no collective agreement of any kind [with the successful union] had ever been made." 173 F. 2d at 770. Furthermore, we think it relevant to note, though counsel did not bring this to our attention, that the enthusiasm for Judge Hand's opinion displayed in the brief and argument here does not appear to be shared by the Board itself. In Federal Telephone and Radio Co., 107 NLRB 649 (1953), the Board held it an unfair labor practice for an employer to entertain a grievance processed by a union other than the certified bargaining agent, and expressed its belief that the Douds opinion "read more than was warranted into the provisos in saying that they permit processing grievances through a rival union in spite of the existence of a certified union;" 107 NLRB at 653 n. 9; this refusal to follow Douds was

explicitly adhered to in Meat & Provision Drivers Union, Local No. 626 (Lewis Food Co.), 115 NLRB 890, 892 (1956).[2]

The court decision we find most nearly in point is National Labor Relations Board v. Kearney & Trecker Corp., 237 F. 2d 416 (7 Cir., 1956), not cited by either party. There the employer, which was refusing to recognize either of two rival unions while the validity of the certification of one was being contested in the courts, had informed its employees that during this period it would continue to entertain their grievances through the channels that had previously been established under a collective bargaining contract, but that the grievances must be presented individually and not through either union or any other group. When employees, led by two spokesmen who were officials of one of the unions, complained about their bonus pay and demanded that its computation be explained to them as a group, the company refused; a number of the men stopped work, the company laid them off for two weeks as a disciplinary measure, and the Board held this to violate §8(a)(1). Enforcement of the Board's order was denied by the Court of Appeals, which held that in the absence of a "certified bargaining representative through whom the employees could process their grievance," complaint by the minority group was protected concerted activity within §7, but that in view of the employer's need to remain neutral in the battle between the unions, the rule by which it refused to entertain grievances unless presented individually was reasonable.

2. This decision was overruled on other grounds in Local 259, Int'l Union UAW (Fanelli Ford Sales), 133 NLRB 1468 (1961).

Without taking any position on the difficult issues suggested by these decisions, we think the Board's order here should be enforced, although we wish the Board had explained its position more thoroughly. Despite the recognized status of Local 355 and the existence of the collective bargaining contract, the examiner reasonably found that "Local 355 had no [grievance] committee functioning at the plant at the time in question." In this vacuum the employees were not required to rest their §7 rights on the hope that when a grievance arose, the individual employee affected would somehow manage to obtain a hearing, which the employee discharged on April 11 had obtained only through a work stoppage. The examiner found that the committee desired by the employees was to be a grievance committee and nothing more. The situation here was significantly different from that in Kearney & Trecker. There the employer had given assurances that grievances would be processed through previously established channels, but had declared by well-publicized rule that they must be presented individually. Here the company president himself recognized the absence of any established grievance procedure, and invited the employees to fill the gap by electing a shop committee. Although he might have been justified in rejecting a committee so dominated by the IUE as to indicate an attempt at "backdoor recognition," and his rejection of the results of the April 12 election may thus have been defensible on the ground that the IUE representative had paid the rent for the hall, the examiner and the Board were warranted in finding that his rejection of the committee on April 19, after it had been unanimously

chosen by 95 of the 120 employees at a meeting free of IUE sponsorship, could claim no such justification. It was thus proper, on the particular facts of this case, for the Board to conclude that Lundy had violated §8(a)(1).[3]

Lundy's final argument relates to the provision in the order directing it to withhold recognition from Local 355 unless and until that union is certified. It does not contend that the Board may never make such an order, as indeed it could not in view of such decisions as International Ladies' Garment Workers' Union v. N. L. R. B., 366 U. S. 731, 739, 81 S. Ct. 1603, 6 L. Ed. 2d 762 (1961), and National Labor Relations Board v. Revere Metal Art Co., 280 F. 2d 96, 100 (2 Cir.), cert. denied, 364 U. S. 894, 81 S. Ct. 225, 5 L. Ed. 2d 189 (1960); see also National Labor Relations Board v. District 50, U. M. W., 355 U. S. 453, 459, 78 S. Ct. 386, 2 L. Ed. 2d 401 (1958). But it stresses

3. In so holding we have no need to determine the continuing validity of the Douds case, either as an unqualified interpretation of the proviso to §9(a) or as limited to situations where the certified union has not entered into a collective bargaining contract or where such a contract has been made but does not provide for grievance procedures. Nor need we consider whether the Board's order, even if not sustainable under §8(a)(1), could be upheld under §8(a)(2) on a ground, running rather counter to the Kearney & Trecker decision, that Lundy's rejection of the elected grievance committee because of its alleged IUE tinge constituted illegal support to Local 355; owing to the unsatisfactory and cryptic nature of the Board's Decision, and particularly its use of the word "thereby," see supra, at p. 924, we cannot tell whether or not the finding of a §8(a)(2) violation was intended to encompass this aspect of the company's conduct or to refer only to the discharge and refusals to reinstate. Likewise, since there was no finding that Local 355 was being illegally supported at the time of the refusal to recognize the grievance committee, we need not consider whether reliance on a contract with that union, even though valid when executed, might constitute a violation of §8(a)(2).

the Board's statement that although it has "rejected the contention that in every case involving assistance in violation of Section 8(a)(2), we should mechanistically order the employer to cease recognizing the assisted union," citing Lykes Bros. Inc. of Georgia, 128 NLRB 606, 611 (1960), so broad an order was proper here because of "the background evidence, showing that the Respondent coerced its employees into designating Local 355 as their collective bargaining representative, and that Local 355 never was their free choice". This, Lundy claims, transgressed the ruling in Local Lodge No. 1424, I. A. M. v. N. L. R. B., supra, with respect to the six-month statute of limitations in §10(b), which led to our previous remand. However, the Supreme Court said in that very decision that "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices [,] . . . earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." 362 U. S. at 416, 80 S. Ct. at 826, 4 L. Ed. 2d 832. It follows *a fortiori* that in such a situation the Board may look to earlier events to determine the appropriate remedy to be prescribed; there is no need to cite the many opinions elaborating on the breadth of the discretion accorded to the Board in framing remedies.

Enforcement granted.

Supplemental Decision and Amended Order of the National Labor Relations Board

On December 29, 1959, the Board issued its Decision and Order in Cases Nos. 2-CA-6083 and 2-CA-6103, finding that the Respondent had engaged in certain unfair labor practices within the meaning of Section 8(a)(1), (2) and (3) of the Act, and ordering that it cease and desist therefrom and take certain affirmative action.[1]

On December 9, 1960, Trial Examiner Reeves R. Hilton issued his Intermediate Report in the remaining cases, finding that the Respondent had engaged in certain additional unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Respondent and the General Counsel filed exceptions to the Intermediate Report together with supporting briefs.

On December 22, 1960, the United States Court of Appeals for the Second Circuit remanded the December 1959 Decision and Order to the Board for reconsideration,[2] in the light of the Supreme Court's decision in the *Bryan Manufacturing Company* case[3] involving the meaning of the 6-month statute of limitations in Section 10(b).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with all of the cases captioned above to a three-member panel.

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1. 125 NLRB 1188.

2. 284 F. 2d 424.

3. *Local Lodge 1424, I.A.M. v. N. L. R. B.*, 362 U. S. 411; 130 NLRB No. 128.

Supplemental Decision and Amended Order

The Board hereby consolidates the remanded cases and the cases pending original decision. The Board has reviewed the rulings made by Trial Examiner Hilton and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The Board has reconsidered the remanded cases in the light of the Court's opinion, and has also considered Trial Examiner Hilton's Intermediate Report, the exceptions and briefs, and the entire record in the cases. The Board hereby adopts the findings, conclusions, and recommendations of Trial Examiner Hilton and reaffirms the original findings, conclusions and order in the remanded cases, insofar as they are consistent with this Supplemental Decision.

As more fully set out in the original Decision and Order and in Trial Examiner Hilton's Intermediate Report, the record shows that in 1957 the Respondent coerced its production and maintenance employees into designating Amalgamated Local Union 355 as their statutory collective bargaining representative, and thereupon recognized and made a union-security contract with it. In July 1958 the Respondent, learning of employee disaffection from Local 355, sought to put a stop to this disaffection by discharging the 3 leaders (Cosentino, Cioffi, and Healy); by notifying its employees that the wage increase provided for in the proposed new contract with Local 355 would be made effective on July 25; by warning them not to disaffiliate from Local 355 and advising them that the wage increase announced 2 days earlier would be withheld unless the contract with Local 355 was signed; by holding a contract ratification meeting in the plant; and by then signing the new contract with Local 355.

The record further shows that employee disaffection from Local 355 recurred in the spring of 1960, after the Board's original Decision and Order requiring the Respondent to withdraw recognition from Local 355. On April 12, President Barbato suggested to the employees that they elect an employee committee to handle future grievances. Pursuant to this suggestion the employees elected a 7-man committee, composed partly of employees who favored the IUE and partly of employees preferring Local 355. However, Barbato refused to recognize this committee because "they all, or at least a number of individuals on the committee, were too much inclined to be in favor of the IUE Union." Barbato further suggested to the employees that they elect a different committee, and that they hold a meeting for this purpose on the Respondent's premises. The employees held such a meeting, but voted to maintain their original committee, and to go on strike if the Respondent refused to recognize it. However, the Respondent continued to refuse to handle grievances with the committee because of its IUE tinge. Accordingly, the employees struck on April 20, picketing with signs stating that they were protesting an unfair labor practice. It was in such a setting that the Respondent sent telegrams to each of the striking employees on April 23, notifying them that they would be replaced if they did not return to work by April 25. However, when Mueller, a striker, returned to the plant and commenced working on the latter date he was promptly discharged by the Respondent at the request of Local 355. And the 6 strikers who unconditionally applied for reinstatement on May 3, 1960, but refused to accept Local 355 as their representa-

tive, were denied reinstatement on the ground (unsupported by the record) that they had already been replaced.

In the light of the Court's remand and the fact that the charges in the cases before the Court were not filed and served until the late summer of 1958, we now make no finding that the Respondent violated the Act in 1957, either by maintaining or by giving effect to its 1957 contract with Local 355. Such a finding would be inescapably grounded on events predating the limitations period. Nor do we find that the Respondent was faced with a valid representation claim by reason of the IUE representation petition filed in July 1958, some 10 months before expiration of the 1957 contract's 2-year term.[4] Under such circumstances no litigable question concerning representation came into existence at that time.[5] We likewise do not find a violation of Section 8(a)(2) or (1) based on the Respondent's conduct in executing or maintaining in effect its 1958 contract with Local 355 after the IUE filed its petition. In all other respects, however, we reaffirm the Section 8(a)(1), (2) and (3) violations found in our original Decision and Order of December 1959.

As for the Section 8(a)(1) and (3) violations alleged in the remaining cases, we agree with Trial Examiner Hilton's findings in support of these allegations. We further find that the Respondent thereby gave continued substantial assistance and support to Local 355 in violation of Section 8(a)(2) of the Act, as also alleged.

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4. *Deluxe Metal Furniture Company*, 121 NLRB 995, at 998, 1000.

5. We find that the Respondent's 1957 contract with Local 355 was not terminated by the conduct of the parties, within the meaning of the case just cited in footnote 4 above, page 1003.

THE REMEDY

The remaining question is whether Section 10(b) precludes us from requiring the Respondent to cease recognizing Local 355 until it is certified by the Board as the exclusive representative of the employees. Mindful that the Board's affirmative orders must be appropriate to effectuate the policies of the Act, we have rejected the contention that in every case involving assistance in violation of Section 8(a)(2), we should mechanistically order the employer to cease recognizing the assisted union.[6] However, as the Supreme Court has long held, our "public right and duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory purposes."[7] The Supreme Court has also stated that it cannot assume that employees will have that complete freedom of choice which the Act contemplates unless the effect of unfair labor practices is completely dissipated, and has emphasized that it is the function of the Board to determine how this objective may best be achieved.[8] Guided by these principles, which allow the Board wide discretion in determining what remedial meas-

[6] *Lykes Bros. Inc.*, 128 NLRB 906, 911.

[7] *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 364.

[8] *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584; *Consolidated Edison v. N. L. R. B.*, 305 U. S. 197; *N. L. R. B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261; *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177.

ures are necessary to expunge the effect of unfair labor practices, we conclude that the Respondent must be ordered to withdraw and withhold recognition from Local 355 until that union is certified, in order to enable the employees to exercise their statutory rights free from the effects of the unfair labor practices which we have found were engaged in by the Respondent. In reaching the conclusion that such remedial provisions are necessary to accomplish the Act's purposes, we have also taken into consideration the background evidence, showing that the Respondent coerced its employees into designating Local 355 as their collective bargaining representative, and that Local 355 never was their free choice. This evidence helps us to fashion the appropriate remedy, and in our opinion is proper to consider under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reasons are barred from forming the basis of a suit, may nevertheless be introduced if it tends to show the purposes and the character of the particular transactions under scrutiny."[9] This principle was necessarily included in the broader sweep of the *Bryan Manufacturing Company* decision,[10] where the Supreme Court, in explaining the purposes of Section 10(b), stated that "where events within the 6-month limitations period

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9. See *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 705; *N. L. R. B. v. National Shoes, Inc., and National Syracuse Corporation*, 208 F. 2d 688, 692 (C. A. 2, 1953), enfg. 103 NLRB 438; *N. L. R. B. v. Sharples Chemicals, Inc.*, 209 F. 2d 645, 653 (C. A. 6), enfg. 100 NLRB 20; *Herbert D. Young, d/b/a Murfreesboro Pure Milk Co.*, 127 NLRB 1101, 1102.

10. *Supra*, footnote 3.

in and of themselves may constitute, as a substantive matter, unfair labor practices, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." In such situations, therefore, background evidence is admissible to aid the Board in deciding whether particular conduct, occurring within the limitations period, constitutes an unfair labor practice. In our opinion the Supreme Court's decision warrants the use of background evidence for the purpose of enabling us to decide what remedial measures are necessary to expunge the effects of the unfair labor practices which occurred within the limitations period.

AMENDED ORDER

Upon the entire records in these cases, and pursuant to Section 10(c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that Lundy Manufacturing Corporation, Glen Head, New York, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of International Union of Electrical, Radio and Machine Workers, AFL-CIO, or any other labor organization, or encouraging membership in Amalgamated Local Union 355, or any other labor organization, by discharging, refusing to reinstate, or in any other manner discriminating against its employees in regard to their hire or tenure of employment or any term or condition of employment.

(b) Threatening its employees with economic reprisals or in any other manner, to influence their choice of a collective bargaining representative.

(c) Recognizing Amalgamated Local Union 355 as the representative of any of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until the said labor organization shall have been certified by the Board as the exclusive representative of such employees.

(d) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist International Union of Electrical, Radio and Machine Workers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Withdraw and withhold recognition from Amalgamated Local Union 355 as the collective bargaining rep-

resentative of any of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until the said labor organization shall have been certified by the Board as the exclusive representative of Respondent's employees.

(b) Offer to Frank Cosentino, John Healy, Frank Ciolli, Erich Mueller, Sam Klein, Murray Kornheiser, Leonard Kopor, Eulogia Ramos, Theodore Rouse, and Irene Steinert immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings each may have suffered because of the discrimination against him, in the manner set forth in the sections of the respective Intermediate Reports in these cases entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, timecards, personnel records and reports, and all other records necessary or appropriate to analysis of the amounts of back pay due, and the rights of reemployment, under this Order.

(d) Post at its plant in Glen Head, New York, copies of the notice attached hereto as "Appendix."[13] Copies of

13. In the event that this Order is enforced by a Decree of a United States Court of Appeals, the Order shall be amended by substituting for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for the Second Region, in writing, within 10 days from the date of this Order, as to the steps Respondent has taken to comply herewith.

Dated, Washington, D. C., April 20, 1962.

FRANK W. MCCULLOCH, *Chairman*,

BOYD LEEDOM, *Member*,

NATIONAL LABOR RELATIONS BOARD.

(SEAL)

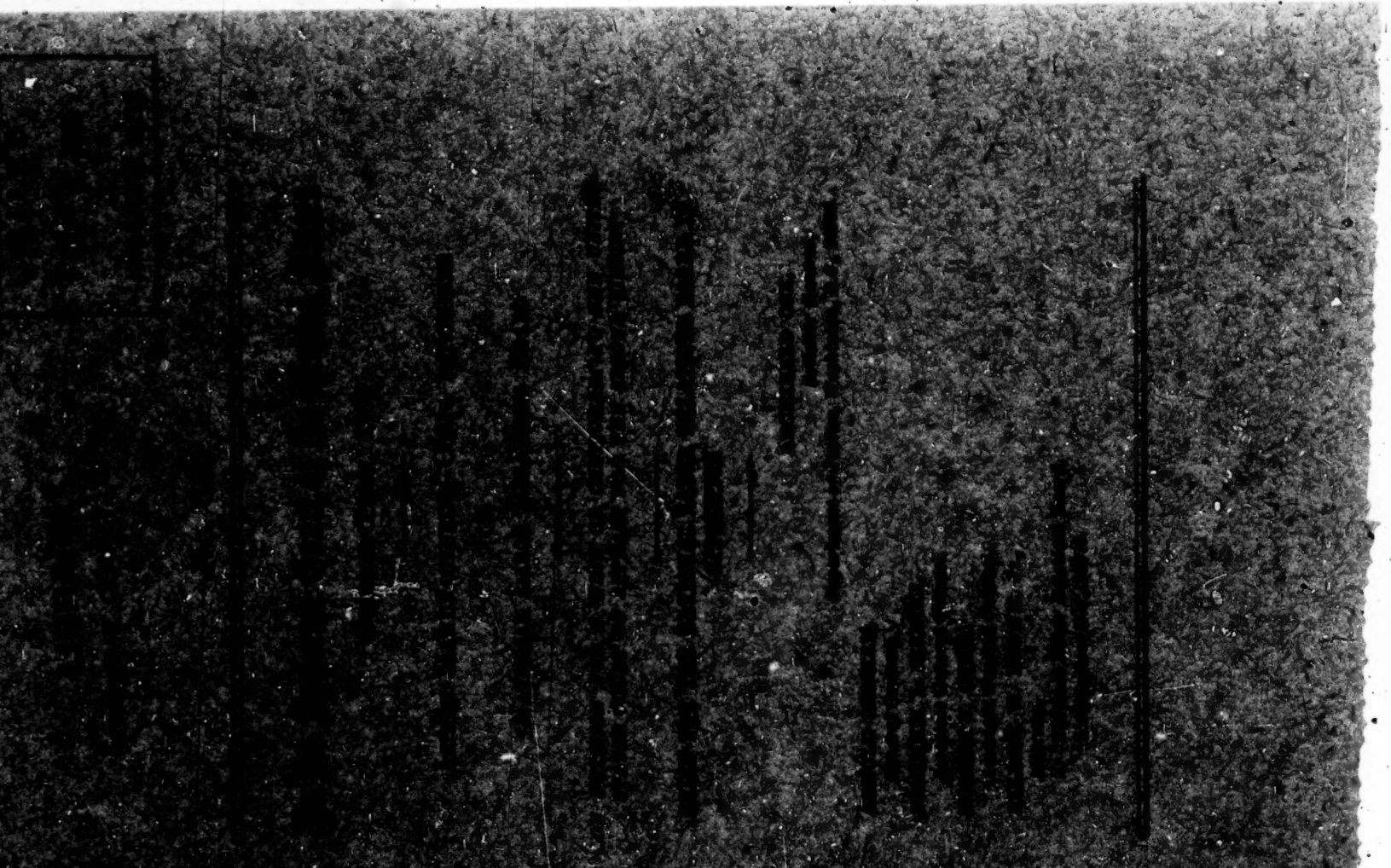
Philip Ray Rodgers, Member, concurring:

I concur in the result.

Dated, Washington, D. C.

PHILIP RAY RODGERS, *Member*,

NATIONAL LABOR RELATIONS BOARD.



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705-030—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 350

LUNDY MANUFACTURING CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–13a) is reported at 316 F. 2d 921. A prior opinion of the court of appeals in the same proceeding is reported at 286 F. 2d 424. The initial findings of fact, conclusions of law and order of the board (B.A. 2–72)[1] are reported at 125 NLRB 1188. The Board's supplemental decision and amended order (S.A. 2–48, Pet. 14a–23a) are reported at 136 NLRB 1230.

[1] "B.A." references are to the appendix to the Board's brief filed for the use of the court of appeals at the time of the initial proceeding before it. "S.A." references are to the supplemental appendix filed with the court of appeals at the time of the second proceeding. References preceding a semicolon are to the Board's findings, and succeeding references are to the supporting evidence.

JURISDICTION

The decision of the court below (Pet. 1a–13a) was rendered on April 26, 1963, and its decree was entered on May 15, 1963 (Pet. 1). The petition for a writ of certiorari was filed on August 7, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly concluded that petitioner violated Section 8(a)(1) of the National Labor Relations Act by refusing to meet with an *ad hoc* grievance committee selected by a majority of its employees at a time when the recognized union's grievance machinery had ceased functioning.

2. Whether the court of appeals enforced the Board's order on grounds different from those relied upon by the Board.

3. Whether Section 10(b) of the National Labor Relations Act prohibits the Board from considering events which have taken place prior to the six-month limitations period in determining the appropriate remedy for an unfair labor practice which has been committed within the limitations period.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 3–4 of the petition.

STATEMENT

Petitioner is a manufacturer of actuators, motors, air valves, and related products. Its employees were not represented by any collective bargaining agent

until May 1957. At that time petitioner signed a collective bargaining agreement with Amalgamated Local 355. Local 355 was a union which Robert C. Barbato, petitioner's president, had selected, and which either did not represent a majority of petitioner's employees or which, if it did represent a majority of the employees, had achieved its majority status as a result of coercion exerted by Barbato (B.A. 14–21; 78–80, 85–90, 146–147, 204–205, 223–226, 257, 265–268, 276).[2] In July 1958, during negotiations over a renewal of the contract, certain of petitioner's employees resolved to disaffiliate from Local 355 and to affiliate with the International Union of Electrical Workers ("IUE") (B.A. 28–29; 111–113, 124, 129–130, 136, 149, 202, 282). Three employees were discharged by petitioner at that time as a result of their activities in furtherance of the disaffiliation movement (B.A. 35–63).[3] Thereafter, the new contract was ratified by a vote of 22 to 13, with 22 employees abstaining (B.A. 32; 99–100, 154–155). The new contract, which, like the earlier contract, contained a

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[2] Petitioner apparently concedes, for purposes of this petition, that the evidence before the Board supported its conclusion in this regard (Pet. 4). When it remanded the case to the Board on other grounds, the court of appeals expressly found the evidence to be sufficient to support this conclusion, 286 F. 2d at 425.

[3] Petitioner does not challenge here, as it did in the court of appeals, the sufficiency of the evidence in the record as a whole to support the Board's finding that these discharges were discriminatorily motivated in violation of Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act, and that they also amounted to unlawful assistance to Local 355 in violation of Section 8(a)(2).

union security clause, was to run until June 30, 1961 (B.A. 291–293). It also provided for grievance machinery through a committee of shop stewards (S.A. 17).

On April 11, 1960, the stewards who were on the grievance committee resigned, and the committee ceased functioning (S.A. 17–18; 129–131, 136–137, 185–186). When one of the employees complained that morning about the odor produced by a machine in the plant, there was no committee to process his grievance (S.A. 18–10; 53-54, 129–131, 136–137, 170–171, 183–186). Another employee who brought the grievance to the attention of the plant manager was discharged for disrupting work (S.A. 19–20; 106–110, 133–134).

Several employees decided to protest the discharge by refusing to work the next morning (S.A. 20; 56–57, 110–111, 134–135). Barbato saw the employees in the parking lot on April 12 and suggested that they return to work and select a committee to discuss the discharge (S.A. 20; 56–58, 111–113, 134–135). Later in the morning, the committee met with Barbato, and the discharge was reduced to a one-day layoff. In the course of the meeting, Barbato suggested that the employees selcet a committee to handle grievances that might arise in the future (S.A. 20; 58–59, 136–137, 186).

In accordance with Barbato's suggestion most of the employees attended a meeting at noon on April 12 at which a grievance committee of seven members was elected (S.A. 21; 60–62, 79–82, 114, 137–138). Two of the committee members had manifested sup-

port for the IUE, two were members of Local 355 who had not signed IUE cards, and the affiliation of the remaining three is not disclosed by the record (S.A. 23; 60, 112, 128, 146). When Barbato saw the committee, he refused to meet with it because its members "were too much inclined to be in favor of the IUE" (S.A. 22; 62–63, 115–116, 139, 171–172).

Another employee meeting was held on April 18, and it was attended by about 95 of petitioner's 120 production and maintenance employees (S.A. 23; 64–66, 120, 140–141, 208). The employees voted unanimously to maintain the grievance committee which had been selected and to strike if petitioner refused to deal with it (S.A. 23–24; 65–69, 118, 140–141). Thereafter, despite the committee's attempt to convince petitioner that its sole purpose was to represent the employees' interests and that it was "free of any outside influence," petitioner continued to refuse to meet with it (S.A. 24–25; 67–69, 118–120, 143). Instead, petitioner posted notices informing the employees that a new wing of the plant would be available for a meeting on April 19, at which time the employees could elect a different grievance committee (S.A. 24–25; 70–71, 200). These notices were torn down by the president of Local 355, who maintained that he would recognize no committee other than one elected "by our own people" (S.A. 25; 141–143, 152–154, 187–188). Petitioner's plant manager informed the *ad hoc* committee on April 19 that he had been instructed not to recognize the committee as constituted, although the petitioner would be willing to recognize any other committee with different membership (S.A. 24; 68, 120).

On April 20 about 80 of petitioner's employees went on strike (S.A. 25–26; 70, 120, 173–174). On April 21 the president of Local 355 called a meeting which was attended by about 40 employees. He termed the strike a "wildcat one" and urged the employees to cross the picket lines. At his suggestion a Local 355 grievance committee was selected (S.A. 28; 131–132, 154–156). During the strike one employee who returned to work was discharged upon the demand of Local 355 (S.A. 29–30; 150–151, 156–157, 176–177).

On May 3 the strikers agreed to return to work (S.A. 30–31; 72–73, 86–87, 93–94, 121–122, 177–178). All who applied for reinstatement were taken back by petitioner with the exception of six employees. Three of these employees were members of the *ad hoc* grievance committee. The others were employees who had been active either in the effort to disaffiliate from Local 355 or in the strike (S.A. 31–33; 73–74, 87–88, 90–105, 122–123, 144–145, 177).

Based on the foregoing, the Board concluded that in July 1958 petitioner had discriminated in violation of Section 8(a)(3) of the Act by discharging the three employees for supporting the IUE, and that it had assisted Local 355 in violation of Section 8(a)(2) and had interfered with employee organizational rights in violation of Section 8(a)(1) by these discharges, and by other acts not relevant in the present posture of the case.[4] The Board also

[4] The Board originally found that petitioner had further violated Sections 8(a)(2) and (1) of the Act by maintaining a contract with Local 355 which contained an illegal union secu-

concluded that, by refusing to deal in April 1960 with the employee grievance committee, petitioner had violated Section 8(a)(1) of the Act and had assisted Local 355 in violation of Section 8(a)(2); that the strike which ensued was caused by these unfair labor practices; and that by refusing to reinstate six strikers and by discharging another, petitioner had again discriminated in violation of Section 8(a)(3) (S.A. 5, 33–39).[5]

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rity clause, on the ground that the contract had been entered into at a time when that union did not represent an uncoerced majority of the employees, and that this violation had been repeated when petitioner entered into a new contract with Local 355 on July 31, 1958, at a time when the majority status of that union was still tainted and when a question concerning representation (raised by the petition filed by the IUE) was pending before the Board (B.A. 33–34). However, Local 355's lack of a *bona fide* majority could only be established by events which occurred prior to January 31, 1958 (six months before the service and filing of the charge forming the basis for the unfair labor practices found by the Board). This Court in *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, held that Section 10(b) of the Act precluded the Board from impeaching a contract, valid on its face, on the basis of events falling outside the six-month limitations period imposed by that section. Accordingly, when that case first came before the court of appeals, it remanded the case to the Board for reconsideration in the light of *Local Lodge No. 1424*. 286 F. 2d 424. After such reconsideration, the Board concluded that it could no longer find that the maintenance of the 1957 contract and the execution of the 1958 contract constituted unfair labor practices. But it reaffirmed its other unfair labor practice findings (S.A. 4–5).

[5] These unfair labor practices were based upon separate charges filed in 1960 (S.A. 1). When the case based on the earlier charges was remanded to the Board by the court of appeals (n. 4, *supra*), the Board consolidated both cases and rendered a single decision and order (S.A. 2).

In addition to the standard cease-and-desist order, the Board, relying upon the "background evidence" which demonstrated that petitioner had coerced its employees into designating Local 355 as their bargaining agent, ordered petitioner to withhold recognition from Local 355 until it had been certified by the Board as the exclusive bargaining representative of petitioner's employees (S.A. 5–7, 9–10). The court of appeals granted enforcement of the Board's order, finding it unnecessary to decide whether the Board was correct in holding that petitioner had violated Section 8(a)(2) by refusing to meet with the *ad hoc* grievance committee (Pet. 12a, n. 3). The court based its decision that Section 8(a)(1) had been violated on the examiner's finding (adopted by the Board) that "Local 355 had no [grievance] committee functioning at the plant at the time in question" (Pet. 11a). It also sustained the scope of the Board's order.

ARGUMENT

Petitioner seeks review in this Court of only two of the many disputed issues in this case. However, the questions which petitioner presents were correctly decided by the Board and the court of appeals, and their decisions are consistent with the principles heretofore announced by this Court. There is no conflict of decisions, nor is there any other reason for further review of any aspect of this case.

1. Petitioner does not challenge the Board's findings, sustained by the court of appeals, that it violated Sections 8(a) (1), (2), and (3) of the Act in July 1958. Nor does it disagree with the Board's

conclusion that, if petitioner's refusal to meet with the *ad hoc* grievance committee was an unfair labor practice, then the discharges which resulted from the strike which followed such refusal constituted violations of Sections 8(a)(3) and 8(a)(1). Petitioner does contend, however, that the refusal to meet with the committee was not a violation of Section 8(a)(1).

This argument is based upon the premise that, at the time the grievance committee sought a meeting with petitioner's president, an existing collective bargaining agreement required petitioner to recognize Local 355 as the exclusive bargaining agent for its employees. It overlooks the critical fact, which the hearing examiner found, the Board adopted, and the court of appeals sustained, that "Local 355 had no [grievance] committee functioning at the plant at the time in question." This finding is buttressed by the conduct of petitioner's president, who recognized that there was no existing grievance machinery and suggested to the employees that they elect a committee.

Section 7 of the Act guarantees employees the right to engage in concerted activities for their mutual aid or protection. This right is reinforced by the proviso to Section 9(a), which reserves to groups of employees "the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect." Recognition of the *ad hoc* grievance committee would not have been inconsistent with the terms of petitioner's contract

with Local 355 since the grievance committee established by the contract was no longer in existence. And, as the court of appeals observed, after 95 of petitioner's 120 employees had met and unanimously backed the committee, petitioner could no longer justify its refusal to meet with the committee on the grounds that the committee was not representative of its employees (Pet. 11a-12a). Indeed, petitioner's announced willingness to deal with any committee other than the one which had been elected belies its present claim that it was seeking to protect the exclusive rights of Local 355.

Nor is there any merit to petitioner's claim that the court of appeals based its decision on grounds different from those stated by the Board. The trial examiner's intermediate report was filed before the earlier case against petitioner was remanded by the court of appeals. See note 4, *supra*. Accordingly, the trial examiner based his conclusion not only on the fact that the Local 355 grievance committee was inoperative as of April 11, 1960, but also on the Board's ruling in the earlier case that the contract with Local 355 was invalid (S.A. 33-34). The Board then consolidated the case which the trial examiner had considered with the case which had been remanded by the court of appeals, and it disposed of both in a single opinion. It first reversed its earlier findings that the recognition of Local 355 and the contracts with it constituted unfair labor practices (S.A. 4-5). It then summarily agreed with the trial examiner's conclusions that petitioner had committed violations of Sections 8(a)(1) and 8(a)(3) with regard to the

grievance committee (S.A. 5). The only reasonable construction of this ruling is that the Board *sub silentio* removed one prop upon which the trial examiner's conclusion rested and adopted the other. Hence the court of appeals was agreeing with the Board's laconic disposition (albeit wishing that "the Board had explained its position more thoroughly") when it said:

> Despite the recognized status of Local 355 and the existence of the collective bargaining contract, the examiner reasonably, found that "Local 355 had no [grievance] committee functioning at the plant at the time in question." In this vacuum the employees were not required to rest their § 7 rights on the hope that when a grievance arose, the individual employee affected would somehow manage to obtain a hearing, which the employee discharged on April 11 had obtained only through a work stoppage. [Pet. 11a.]

2. Equally without substance is petitioner's objection to the scope of the Board's remedy. This Court has sustained orders which have followed violations of Section 8(a)(2) and which have directed that recognition be withheld from an unlawfully assisted union until after election and certification. *E.g., National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453, 459. In the present case, petitioner does not challenge the Board's finding, which was upheld by the court of appeals, that it violated Section 8(a)(2) in July 1958, when it discharged the three employees who were actively urging disaffiliation with Local 355 and affiliation with the

IUE. Consequently, it was entirely appropriate for the Board to invoke its usual remedy in such cases and require a new election.

It is true that the Board, in assessing the seriousness of petitioner's unfair labor practices and the need for the remedy imposed, took "into consideration the background evidence, showing that [petitioner] coerced its employees into designating Local 355 as their collective bargaining representative, and that Local 355 never was their free choice" (S.A. 6–7). Although Section 10(b) forbids basing any unfair labor practice findings on this evidence, since it pertained to matters which occured more than six months before the charges were filed and served, it does not foreclose the use of such evidence in fashioning an appropriate remedy. Section 10(b) merely provides that "no complaint shall issue *based upon any unfair labor practice* occurring more than six months prior to the filing of the charge with the Board * * *." (Emphasis added.) In *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, 416, this Court recognized that, even when the Board is engaged in deciding whether an unfair labor practice has been committed, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." As the court below stated, "It follows *a fortiori* that in such a situation the Board may look to earlier events to determine the appropriate remedy to be prescribed * * *" (Pet. 13a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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